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Attorneys for the CITY OF LIVERMORE
AND TIMOTHY LENDMAN

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OSCAR FRANCO-LUNA,

Plaintiff,

v.

CITY OF LIVERMORE, et al.

Defendants.

Case No.

NOTICE OF REMOVAL OF ACTION
UNDER 28 U.S.C. § 1441(A) (FEDERAL
QUESTION)

TO THE CLERK OF THE UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that Defendants CITY OF LIVERMORE and TIMOTHY
LENDMAN hereby remove to this Court the state court entitled *Oscar Franco-Luna, Plaintiff, vs.
the City of Livermore, Livermore Police Department, Officer Timothy Lendman, and DOES 1*

1 *through 20, Defendants*, case number RG13697878, filed on October 3, 2013, in the Superior
 2 Court of California, County of Alameda (“the Action”).

3 Removal is based on the grounds that federal question jurisdiction exists over the Action,
 4 pursuant to 28 U.S.C. §§ 1331 and 1441(a) because it involves claims and defenses that arise under
 5 federal law. Specifically, this claim arises under 42 U.S.C. § 1983. This Notice of Removal is
 6 timely because it has been filed within the thirty-day period prescribed by 28 U.S.C. § 1446(b).
 7 Copies of the Complaint and other documents, constituting the entire Alameda County Superior
 8 Court file in the Action, are attached as Exhibit A.

9 **SUMMARY OF COMPLAINT**

10 1. On October 3, 2013, Plaintiff filed the Complaint against the City of Livermore, *et*
 11 *al.*, in the Superior Court of the State of California in and for the County of Alameda.

12 2. Plaintiff presents his claims as arising under state law – i.e., California Constitution
 13 claims (Complaint, Sixth Cause of Action, ¶¶ 38-42). However, Plaintiff’s claims are
 14 predominantly based upon claims arising under federal law (also *see* Complaint, ¶ 27).

15 3. The first date upon which defendants CITY OF LIVERMORE and TIMOTHY
 16 LENDMAN received a copy of the said complaint was October 3, 2013 when defendants were
 17 served with a copy of the said complaint and a summons from the said state court.

18 **FEDERAL QUESTION JURISDICTION**

19 4. Removal is proper and federal jurisdiction exists over the Action pursuant to 28
 20 U.S.C. § 1441(a) because this case could originally been filed in this Court, pursuant to 28 U.S.C.
 21 § 1331, because Plaintiff’s claims arise under the U.S. Constitution. (U.S. Constitution, Article III,
 22 ¶ 2)

23 5. Federal question jurisdiction exists because Plaintiff’s claims raise a substantial
 24 federal question (i.e. an action for damages because of deprivation of civil rights). Although the
 25 pleading in this case, on its face, attempts to disguise the federal claims, the claims raised in the
 26 Action arise under federal law. Plaintiff cannot defeat removal of a federal claim by disguising or
 27 “arfully pleading” it as a state claim. If the *only* claim involved is one arising under federal law,
 28 the federal court will “recharacterize” it accordingly... (Weil & Brown, California Practice Guide,

1 *Federal Procedure Before Trial* (TRG 2011), 2:2566, citing *Rivet v. Regions Bank of Louisiana*
 2 (1998) 522 U.S. 470, 475; *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d. 189, 191 (9th Cir.
 3 1983); and *Sullivan v. American Airlines, Inc.* 424 F.3d. 267, 271 (2nd Cir. 2005); Also see *In re*
 4 *Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980). Federal law is an element of the state claim, in that
 5 federal law created plaintiff's right to sue and provides a right of action.

6 VENUE

7 6. Venue for removal is proper in this Court under 28 U.S.C. §1441(a) because this
 8 district embraces the Superior Court of the State of California for the County of Alameda, the
 9 forum in which the removed action was pending.

10 NOTICE

11 7. Immediately following the filing of this Notice, Defendants will file a copy of this
 12 Notice of Removal with the Clerk for the Superior Court of California, County of Alameda.

13 8. The documents attached hereto as Exhibit A constitute the entire Alameda County
 14 Superior Court file in the Action.

15 CONSENT OF THE DEFENDANTS

16 9. Defendants requesting the instant removal include defendant CITY OF
 17 LIVERMORE and OFFICER TIMOTHY LENDMAN. Also named as a defendant is the
 18 LIVERMORE POLICE DEPARTMENT, which is a department within the CITY OF
 19 LIVERMORE, and not a separate entity. Accordingly, all defendants have consented to the
 20 removal.

21 DATED: October 30, 2013

Respectfully submitted,

23 By: /s/ E. Kevin Young

24 E. Kevin Young
 25 Assistant City Attorney

26 Attorneys for Defendants
 27 CITY OF LIVERMORE and TIMOTHY
 28 LENDMAN